No. 98-[illegible]

IN THE

Supreme Court of the United States

October Term, 1998

HENRY L. BORDEN,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where the uncontradicted evidence in a suit under § 301 of the LMRA showed that the union diligently investigated the case and defended petitioner, its member, in a final and binding grievance proceeding, may petitioner overturn the grievance award on a "hindsight" argument that the union representative could have conducted the investigation and grievance presentation better?

2. Where respondent filed its appeal ten days after the trial court denied its reserved motion for a directed verdict, was the appeal untimely merely because the court had caused judgment to be entered on the jury verdict more than sixty days before the appeal?

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STATEMENT

Petitioner Terry L. Borton ("Borton") asks this Court to grant certiorari to review and reverse a determination that he failed to introduce sufficient evidence to take his case to the jury. Borton's argument that his union breached its duty of fair representation is based upon a statement of material facts (Petition, pp. 3-10) that omits any mention of the uncontradicted evidence of most of the actions which his union took on his behalf. Instead, Borton describes a series of supposed defaults of the union without any reference to the record. The supposed facts are at best clear distortions of the record before the courts below.

What the record does indicate is that petitioner, Borton, driving a tractor belonging to respondent, United Parcel Service, Inc. ("UPS") and pulling double trailers, collided with the rear-end of a flatbed trailer truck loaded with lumber traveling in the same westbound direction on a straight and level stretch of the Indiana Toll Road. Upon impact with the lumber truck, Borton's tractor and two trailers jackknifed to the left, effectively blocking both westbound lanes of the Indiana Toll Road so that a passenger car, traveling westbound, plowed into one of the UPS trailers. The driver of the passenger car was seriously injured. (53a-56a).[1]

UPS promptly investigated the accident. In the course of its investigation, Borton admitted that he had not seen the lumber truck before his collision with it. Borton submitted his own accident report (49a-52a), detailing his version of the accident, wherein he specifically

1. "a" references are to the Appendix in the United States Court of Appeals for the Seventh Circuit. "T." references are to the notes of testimony of the trial in the United States District Court for the Northern District of Indiana.

noted that his UPS vehicle was traveling at 55 miles per hour and that the speed of the lumber truck was 50 miles per hour. Borton's own accident report further stated that the lumber truck was "going straight" at the time of the collision, and included a diagram of the accident describing the position of the vehicles at the moment of impact. *Id.*

The lumber truck was equipped with numerous rear-facing reflectors and Borton's headlights were in use at the time of the collision. The lumber truck was illuminated by Borton's own headlights for between 27.2 seconds and 81.8 seconds prior to impact as calculated from Borton's own description of the accident and the carrying distance of his truck's low and high beams. (*See* Vol. II, T. 243-44.) Borton reported that there were no witnesses to the accident.

On August 14, 1979, following its investigation, UPS notified Borton that his employment was terminated pursuant to Article 16 of the collective bargaining agreement between UPS and Local 710. Article 16 of the agreement (45a) states that an employee may be discharged for just cause without a warning notice if, for example, the cause of his discharge is "recklessness resulting in a serious accident."

On August 17, 1979, Borton filed a grievance with Local 710 protesting his discharge from the employment of UPS. Borton's grievance (48a) stated that he was "awake at the time of the accident" but that he nonetheless failed to see the lumber truck before the collision. He argued therein that he had two years of safe driving with UPS and that in his opinion he had not been reckless.

As is its practice, Local 710, upon receiving notice of Borton's discharge and before Borton even filed his grievance, dispatched one of its agents, Robert Falco, from Chicago to Indianapolis to inspect the accident investiga-

tion materials gathered by UPS. Investigation of the Borton accident was Falco's only purpose in coming to Indianapolis. Once there, Falco met with UPS' Indiana Safety Manager, Don Weber, and reviewed with Weber at least a dozen photographs of the accident scene and vehicles involved, two Indiana State Police Reports (53a-56a) concerning the accident, and various diagrams or field sketches depicting the manner in which UPS had concluded that the accident occurred. Falco also reviewed the accident report prepared by Borton. (49a-52a, 93a). The following day, Falco, who had driven this very section of the Indiana Toll Road more than a thousand times while he was an active truck driver, drove from Indianapolis to the scene of the accident on the Indiana Toll Road in LaGrange County, Indiana (in excess of 150 miles), where he observed the scene of the accident, including the skidmarks, and verified the authenticity of the UPS photographs previously inspected. Upon his return to Chicago, Falco discussed with John Altepeter, business agent for Local 710, his investigation and the evidence relied upon by UPS in discharging Borton. (Vol. II, T. 352-53, 378).

On August 24, 1979, Borton's grievance was presented to the UPS-710 Grievance Committee (the "Committee"). UPS presented its case supporting Borton's discharge. Borton was represented by John Altepeter and Robert Falco, and participated in the hearing himself. (34a). Altepeter argued before the Committee that the accident was not Borton's fault and that Borton was not reckless. *Id.* Altepeter maintained that the lumber truck either pulled in front of Borton from off of the emergency lane or was stopped in the road. Altepeter used certain photographs, previously inspected by Falco in his investigation, to pinpoint for the Commission a dent in the rim of the lumber truck's left rear wheel to support his theory. (90a-91a). Altepeter further argued that Borton had taken evasive

action prior to the collision with the lumber truck and that, therefore, Borton must have been keeping a lookout for other vehicles on the Toll Road. (65a-66a). Borton's two years of safe driving was emphasized by Altepeter as at least a mitigating factor for the Committee to consider. (90a).

Borton, as well, presented his version of the accident to the Committee. At the close of the evidence, the Committee asked Borton if he had anything else to add to the evidence or to say to the Committee, and Borton responded that he did not. (80a).

Having viewed the evidence relied upon by both parties, having heard their arguments and having heard the parties' responses to its cross-examination, the Committee met to consider its decision. Thereafter, the Committee advised the parties that Borton's grievance was denied and that his discharge was upheld. This decision, under the terms of the collective bargaining agreement, was final and binding. (46a).

Borton's contention that Local 710 should have discovered that he was discharged for having a serious, avoidable accident rather than for his recklessness is pure semantics. Prior to trial, counsel for Borton *stipulated* that "Plaintiff's Teamster Business Representative, John Altepeter, argued before the Joint Panel that Plaintiff's accident was not his fault and *therefore he was not reckless.*" (34a) (emphasis added). The evidence at trial was consistent with Borton's counsel's stipulation. *See, e.g.*, Vol. II, T. 36-64; Vol. II, T. 237.

Equally importantly, Local 710 did not err in failing to present evidence of other accidents which did not result in discharges. The uncontradicted testimony of Ettore Giovannetti, UPS' Regional Labor Manager and co-chairman of the Committee, established that the Committee considers each grievance before it on a "case by

case" basis. Vol. III, T. 234. Borton's counsel was unable to present any evidence at trial that the discipline imposed by UPS upon drivers Stalbaum and Roose was ever grieved by those individuals and therefore presented before the Committee for review or that the Stalbaum and Roose accidents were essentially similar to Borton's. Instead, the uncontradicted testimony of James Pandoli, UPS Feeder Manager, was that neither the Stalbaum nor the Roose accident involved serious injuries and that, in Roose's accident, the damage to the vehicle was no greater than $100.00,[2] *i.e.*, it was not a "serious accident." Vol. II, T. 129. In other words, there was no evidence elicited which would permit a jury to infer that the presentation before the Committee of other accidents would have altered the Committee's decision denying Borton's grievance.

Finally, there is simply no evidence in the record to support Borton's allegation that "Altepeter instructed Borton not to mention" the accidents involving Stalbaum and Roose at the grievance hearing. Similarly, the "legal authority" which Borton supplied to Altepeter was never identified at trial or described so that its relevancy could be determined, although the same counsel who supplied the authority to Borton in advance of the grievance hearing continued to represent him in the courts below and in this Court.

With respect to the timeliness of the appeal to the United States Court of Appeals for the Seventh Circuit, the relevant events began in the district court when on December 18, 1981, at the close of all the evidence, UPS moved for a directed verdict. The district court reserved

2. In the court below, Borton admitted that his accident resulted in serious injury to the driver (F. Smith) of the passenger car. Brief of Plaintiff-Appellant at 4. (*See also* Vol. III, T. 441 for a description of F. Smith's injuries.) According to Borton, the tractor he was driving and its two trailers were a "total loss." (51a).

ruling on the motion and, after entering its judgment on the verdict, set a briefing schedule. On or about December 24, 1980, UPS served its "Motion for Stay Pending Disposition of Motion for Directed Verdict, Judgment Notwithstanding the Verdict or New Trial." This motion was granted on December 30, 1980. On January 15, 1981, the court entered an order granting UPS "a thirty (30) day extension of time in which to file its notice of appeal, which time period shall begin to run from the day on which the Court enters its disposition of all pending post-trial motions."

Pursuant to the district court's briefing schedule, UPS served its memorandum in support of its motion for directed verdict, judgment notwithstanding the verdict, or new trial on or about January 26, 1981. Thereafter, on January 30, 1981, the court set "Oral Argument and Hearing on all Post-Trial Motions" for March 20, 1981. On or about February 18, 1981, consistent with the court's briefing schedule, Borton filed his "Memorandum in Opposition to Defendant, United Parcel Service, Inc.'s Motion for Directed Verdict, Judgment Notwithstanding the Verdict, or New Trial." UPS' Reply Brief was filed on or about March 9, 1981.

On March 20, 1981, the issue of whether there was substantial evidence in the record at trial from which the jury could have properly found for Borton was argued before the district court. At the close of the hearing, the court stated: "For the record, I now deny and overrule all of the Defendant's post-trial motions and I believe that sets in motion the 30-day period for notice of appeal under the order." (Vol. VI, T. 51.) UPS filed its notice of appeal on March 30, 1981.

Nevertheless, Borton moved to dismiss UPS' appeal as untimely. On September 25, 1981, the court of appeals denied the motion in an unpublished opinion.

ARGUMENT

Borton has asked this Court to grant certiorari to decide two questions which it argues were answered wrongly by the court of appeals and merit review by this Court. One conclusive answer is that even if the court of appeals had made the errors with which it is charged, these are not questions which need or are entitled to this Court's attention. The other conclusive answer is that the court of appeals did not make any of these errors, and that there was ample basis for that court's decision.

I. Borton's Petition Raises No Questions Which Deserve Consideration by This Court.

Although succeeding sections of this brief answer each of petitioner's questions on the merits, we begin by noting that none of those questions merits consideration by the Court under the standards of Supreme Court Rule 17.

Although petitioner Borton tries to frame his principal argument in terms of a conflict with the standards set forth by this Court in *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976), the real question before the court below, as it would be before this Court, is whether the evidence establishes that Borton's union represented him in a fashion that breached its duty of fair representation.

This is essentially a factual question, not a legal one. Indeed, UPS relied heavily on *Vaca* and *Hines* in its briefs below and argued, as it does here, that it is those cases which, together with this Court's intervening decision in *Motor Coach Employees v. Lockridge*, 403 U. S. 274 (1971), required reversal on the factual record in this case. This Court has established the legal principles; it is simply being asked to reapply them here.

Second, even if the Court were called upon to determine whether the Seventh Circuit's brief unpublished order in this case posed legal issues which, in the abstract, were worthy of this Court's attention, those issues were resolved by the court of appeals in a manner fully consistent with this Court's decisions and in harmony with the decisions of the other courts of appeals which have faced them.

Finally, the question answered in the unpublished order denying Borton's motion to dismiss the appeal is equally unworthy of this Court's attention. Even if the district court and the court of appeals had not correctly determined that the time for appeal ran from the time that the district court disposed of a pending motion which would have overturned the judgment had it been granted, and that that rule applied whether the motion was a reserved motion for directed verdict, as here, or a motion specifically labeled as a filing under F. R. Civ. P. 50(b), 52(b), 59(b), or 59(e), that resolution is neither egregiously unreasonable nor likely to influence the decision of any other case.

As the succeeding sections of this brief indicate, the court of appeals did not misread either § 301 of the Labor Management Relations Act or Rule 4 of the Federal Rules of Appellate Procedure, but even if, arguendo, Borton were right in his view of the opinion below, he has failed to show any "special and important reasons" why this Court should review this case.

II. The Court of Appeals Correctly Reversed the Judgment in Favor of Borton Because He Failed To Prove That His Union Breached Its Duty of Fair Representation.

Unless Local 710 breached the duty of fair representation it owed Borton, the final and binding decision

of the Committee bars this suit. *See, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976). Because Borton did not submit evidence from which the jury could have found such a breach, the district court should have granted UPS' motion for a directed verdict. Since it failed to do so, the court of appeals correctly reversed.

A. There Was No Evidence of Lack of Fair Representation on the Part of Borton's Union.

Borton was discharged because he demolished his UPS tractor-trailer by driving it into the back of a loaded lumber truck, throwing it across both lanes of the Indiana Toll Road and into the path of an oncoming motorist who was severely injured. By his own statement, he was awake at the time and had his headlights on. On these facts, he argues that his union could somehow have argued successfully that he was not reckless.

The testimony presented at trial was virtually identical to that presented on Borton's behalf by the union at the grievance hearing. Although Borton had opposed UPS' original motion to dismiss the complaint on the ground that:

> "Since the Union failed to investigate the accident in plaintiff's behalf, the only detailed 'investigation' undertaken was by the defendant [UPS], through its agents and insurer. Without accusing defendant of partiality in its investigations, plaintiff finally may have the opportunity to conduct his own investigations, through the discovery machinery available in the instant lawsuit. (Affidavit of plaintiff, ¶ 11.) Depositions, including those of the other driver, George Craven, his passenger, James Nix, and the mechanic in Elkhart, Indiana, who examined the vehicle plaintiff was driving (affidavit of plaintiff, ¶ 6)

> may be taken. Other evidence may be disclosed which would allow a jury to find exactly how the accident did occur." (Plaintiff's Brief in Opposition to Defendant's Motion to Dismiss Complaint or for Summary Judgment served January 14, 1980, at 6.),

no fact witnesses were called who had not testified at the grievance hearing and no new evidence was presented at trial which was not introduced at the grievance hearing. Instead, Borton argued that Local 710 had failed to represent him because it did not permit him to be represented by his attorney at the grievance hearing (Vol. II, T. 191), did not present a piece of paper—never identified—provided by that attorney and which Altepeter thought to be irrelevant (Vol. II, T. 192), did not refer to two other cases where UPS allegedly had not discharged a driver involved in a serious accident (Vol. II, T. 253-54), and did not conduct a "full" investigation of the circumstances surrounding the accident (*passim*). None of these allegations, either singly or taken in the aggregate, is sufficient to establish a breach of the duty of fair representation.

Moreover, the union investigation as described in undisputed testimony was a remarkably thorough one. As noted above, Falco examined the entire UPS file in Indianapolis, which included Borton's own narrative of the events surrounding the accident, two state police reports, and diagrams and photographs of the scene (49a-56a, 94a). Then, although he had been a UPS over-the-road driver on Borton's route and had passed the accident scene more than 5,000 times, Falco drove more than 150 miles to the scene to ensure that the photographs taken by UPS were accurate and to check the skid marks and other evidence on the scene. Even though the Committee lacks the subpoena power available to the federal courts (and not used by Borton, despite his brave words in his

opposition memo), Falco attempted unsuccessfully to reach the driver of the lumber truck.

In this Court, Borton goes further, urging that the union could not have done less than it did to represent him unless it had failed to appear at the hearing itself. (Petition, p. 12). By Borton's own testimony at trial (and contrary to his assertion in his Petition), Local 710's business agent, John Altepeter, did "counsel" with him when they discussed the facts of the accident by telephone prior to the Committee hearing (Vol. II, T. 188); and in his brief in the court below, Borton's counsel summarized the trial court record by saying that Local 710 met with Borton, "and discussed the accident and his discharge in 'significant detail . . . the day of the hearing.'" (Brief of Plaintiff-Appellee at 20). By whatever standards Borton may urge, this representation by his union can hardly be described as perfunctory.

B. The Cases in This Court and in the Courts of Appeals Plainly Do Not Permit the Redetermination of a Final and Binding Grievance Award Unless the Union's Conduct Was Arbitrary, Discriminatory, or in Bad Faith.

Borton here argues that there is a conflict between the Seventh Circuit's determination that in order to show a breach of the duty of fair representation, he had to "'adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.'" (quoting *Motor Coach Employees v. Lockridge*, 403 U. S. 274, 301 (1971)), and the decisions of this Court in *Vaca v. Sipes*, 386 U. S. 171 (1967), and *Hines v. Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976).

In fact, all of these cases are attempts to restate the same principles in terms of the facts of the specific case before the Court. *Hines* explicitly restated the stand-

ards set forth in *Humphrey v. Moore*, 375 U. S. 335 (1964), and *Vaca*. The *Vaca* Court had held in this regard that: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U. S. at 190. Justice White (the author of the majority opinion in both *Hines* and *Vaca*) noted in *Vaca* that even a union's failure to take a meritorious grievance to arbitration does not consitute a breach of this duty unless the union acted arbitrarily or in bad faith. 386 U. S. at 192-95. In *Hines*, the Court added that a union's errors in judgment would not be sufficient to show a breach of the duty. 424 U. S. at 571.

Moreover, the courts of appeals have had little trouble applying this Court's formulations to the cases before them. Well before this case, the Seventh Circuit had reversed a judgment and ordered an action dismissed on a record similar to this one. *Cannon v. Consolidated Freightways Corp.*, 524 F. 2d 290 (7th Cir. 1975). The Court of Appeals for the Third Circuit, *Findley v. Jones Motor Freight*, 639 F. 2d 953 (3d Cir. 1981), and for the Fourth Circuit, *Hardee v. North Carolina Allstate Services, Inc.*, 537 F. 2d 1255 (4th Cir. 1976), in the only other two cases directly on point which we have been able to discover, reached identical rulings. Under the circumstances the court below was clearly correct in its choice of legal standards by which to measure Local 710's conduct.

III. The Appeal Taken Ten Days After the District Court Disposed of UPS' Reserved Motion for a Directed Verdict Was Plainly Timely.

Borton argues that because the post-trial argument on the sufficiency of the evidence to take this case to the

jury involved UPS' reserved motion for a directed verdict rather than a motion under one of the rules which specifically tolls the time during which an appeal must be taken, the time for appeal began to run when judgment was entered on the verdict, and the district court unlawfully extended the time within which UPS could appeal beyond the 30 additional days permitted by F. R. A. P. 4(a)(5). This attempt to elevate form over substance has no basis in logic or law.

Despite the fact that the district court had entered judgment on the verdict, until the open motion was disposed of on March 20, 1981, there was no final judgment from which an appeal properly could have been taken pursuant to the jurisdictional provisions of 28 U. S. C. § 1291. A judgment is final only if it terminates the litigation on the merits and leaves nothing for the trial court to do but execute the judgment. *Catlin v. United States,* 324 U. S. 229 (1944); *Stevens v. Turner,* 222 F. 2d 352, 353 (7th Cir. 1955). It is axiomatic that an appeal may only be properly taken from a final judgment. *See, e.g., Catlin v. United States, supra* at 233.

The question of finality in this case is controlled by the nature and effect of the motions which were pending undetermined in the court below after December 18, 1980. There was, at the very least, a reserved motion for directed verdict pending before the district court until it was overruled on March 20, 1981. This motion was addressed to the substantive merits of the case below. If the motion had been granted, judgment would have been entered in favor of UPS. Thus, the significance of the motion is the same as that of those motions designated in Rule 4(a)(4) of the Federal Rules of Appellate Procedure which specifically toll the running of the time for appeal during their pendency. The effect of the reserved

motion for a directed verdict was to keep in the district court a continuing jurisdiction to grant UPS judgment despite the jury's verdict and thereby to deprive the December 18, 1980 judgment of the finality essential to this Court's jurisdiction. *See Healy v. Pennsylvania Railroad*, 181 F. 2d 934 (3d Cir. 1950), *cert. denied*, 340 U. S. 935 (1951).

Thus, prior to March 20, 1981, no final (and thereby appealable) judgment had been entered by the district court. It therefore follows that the notice of appeal filed on March 30, 1981 was altogether timely to vest the court of appeals with jurisdiction as it was filed ten days after the entry of final judgment.

Moreover, it is apparent from a review of the record that both UPS and the district court treated the substantive issues pending between December 18, 1980 and March 20, 1981 as being raised by "post-trial motions" pursuant to Rules 50(b) or 59 of the Federal Rules of Civil Procedure. It is moreover abundantly clear that both UPS and the district court concluded that the pending post-trial motions tolled the time within which to file a notice of appeal. In reliance upon the district court's order of January 15, 1981 extending the time within which to file its notice of appeal, UPS refrained from filing its appeal until after the pending motions had been overruled. Even an extremely narrow interpretation of F. R. A. P. 4 should not preclude a party's justifiable and good faith reliance upon the finality rule, upon specific order of a district court.

A reserved motion for a directed verdict was the functional equivalent of a motion for judgment n.o.v. under Rule 50(b). But, even assuming, *arguendo*, that a motion for judgment under Rule 50(b) had not been substantively and formally made by UPS, a motion under

Rule 59 to alter or amend the judgment (Rule 59(e)) was clearly before the district court by way of the reserved motion for a directed verdict. Any kind of motion which draws into question the correctness of the judgment is considered a motion under Rule 59(e), whatever the label. 9 J. Moore, *Federal Practice* ¶204.12[1] (1980); C. Wright, A. Miller, E. Cooper, E. Gressman, 16 *Federal Practice and Procedure* § 3950 n. 7 (1977), and cases cited therein.

Under any of these theories, the court below had jurisdiction over the appeal.

CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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